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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Cable Television)
Consumer Protection and)
Competition Act of 1992)
)
Cable Home Wiring)
)

MM Docket No. 92-260

To: The Commission

COMMENTS OF
LIBERTY CABLE COMPANY, INC.

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
I. BACKGROUND.....	1
II. CHANGING PROVIDERS MUST BE SIMPLE AND EASY FOR THE CONSUMER.....	3
III. USE OF CABLE HOME WIRING MUST BE THE CONSUMER'S DECISION.....	4
IV. CABLE HOME WIRING IS A FIXTURE.....	5
V. SERVICE TERMINATION MUST NOT RESULT IN FRUSTRATION OR DELAY OF COMPETING SERVICE.....	7
VI. SIGNAL LEAKAGE, SPLITTERS, TERMINATORS AND BARREL THROUGH CONNECTORS.....	8
VII. COMPETITOR'S ACCESS TO CONDUITS AND MOLDINGS FOR FEEDER CABLES.....	10
VIII. THERE IS NO NEED TO TAILOR RULES FOR DIFFERENT SETTINGS.....	11
EXHIBIT A - Principles to be Incorporated in the Commission's Rules for Cable Home Wiring	
EXHIBIT B - Metropolitan Cablevision, Inc., Plaintiff-Appellee v. Cox Cable Cleveland Area, Defendant-Appellant	

SUMMARY

Liberty Cable Company, Inc. ("Liberty") is a satellite master antenna television operator in New York City. Liberty is a competitor of Time Warner Cable and has a great deal of experience with the competitive aspects of the home wiring issues which are the subject of this proceeding.

The Commission must assure, whatever provisions are ultimately adopted concerning home wiring, that changing vendors of video programming will be simple and easy for the consumer. Failure to follow this principle will result in a minimization of competition to existing cable television operators ("CATV") and higher prices for consumers.

Competitors to CATV must be able to use existing home wiring without any interference or interruption by CATV. Competitors must not be required to duplicate existing home wiring due to the disruption such duplication will cause to the homeowner.

The most important principle which must govern the Commission's actions in this proceeding is that the homeowner must have absolute control over how home wiring is used, including which vendor of video services will use the home wiring. This can be achieved by declaring home wiring to be a fixture and the property of the homeowner. CATV has been compensated for this wiring through service and installation fees charged to the homeowner.

The Commission should also assure that termination of service does not result in frustration or delay of a competing service. A video vendor whose service has been terminated will have no incentive to cooperate with a replacement vendor. The Commission can avoid such problems by providing that a homeowner can appoint an agent (which could be the replacement vendor) to arrange for and implement the termination of existing service, including the removal of converter boxes or other equipment, and terminating feeder cables.

Installation of locking terminators and other equipment to prevent signal leakage must be done in a manner that does not interfere with the use of home wiring by a competing vendor. The Commission must assure that any taps or splitters affixed to home wiring are part of the home wiring and available for use by competitors.

The Commission should adopt rules modeled on provisions in the New York City franchise to assure that feeder cables are not placed in such a way that only CATV has access to home wiring. These provisions of the franchise can be found at page 10 hereof. Liberty has invoked these provisions to obtain joint access with Time Warner to necessary conduits and moldings for the placement of Liberty's feeder cables and to take control of a building's master antenna.

Liberty proposes several principals (see Exhibit A) that Liberty suggests guide the Commission in crafting rules for the

home wiring area. If the Commission follows these principals, the Commission will not find it necessary to tailor its home wiring rules for different settings.

The Commission should consider preempting state mandatory cable access laws that frustrate the growth of technologies that compete with CATV. The Commission should also consider conducting an inquiry into, and rulemaking on, the use of exclusive contracts by franchised cable operators to lock out competitors from buildings.

COMMENTS OF LIBERTY CABLE COMPANY, INC.

Pursuant to the Notice of Proposed Rulemaking in the above captioned proceeding (the "NPRM"), Liberty Cable Company, Inc. ("Liberty") submits these comments on the implementation of § 16(d) in the Cable Consumer Protection and Competition Act of 1992, Public Law No. 102-385, 102 Stat. 1460 (1992) (the "Cable Act of 1992"). In these comments, Liberty describes the principles that should be incorporated in any rules adopted by the Federal Communications Commission (the "Commission") concerning "Cable Home Wiring." A summary of the principles is annexed as Exhibit A.

I. Background

Liberty is a satellite master antenna television ("SMATV") operator in New York City currently serving approximately 7,000 subscribers at dozens of sites in the New York City metropolitan area. Liberty has built the largest 18 ghz network in the United States and is a pioneer in the use of 18 ghz microwave equipment to redistribute its signal. Liberty will also be among the first video programmers in the U.S. to test "video dialtone" service and technology beginning in 1993. To the best of Liberty's knowledge, it is the only SMATV company in the country that is successfully overbuilding and competing head to head with a local franchised cable company. Liberty's franchised competitor in New York is Time Warner, Inc. which does business in Manhattan through Manhattan Cable Television and Paragon Cable Manhattan and in the outer boroughs through B-Q Cable, QUICS and Staten Island Cable.

Liberty has extensive experience in the role played by Cable Home Wiring* during the overbuild of an entrenched cable company. Liberty has found that subscribers are quite eager to take cable service from an alternative vendor. However, Liberty's access to and the use of Cable Home Wiring is critical to translating the customer's desire for a competitive service into a reality. Liberty feels certain other competitors to cable service will have a similar view about access to and the use of Cable Home Wiring.

All of Liberty's subscribers are in multifamily complexes—cooperatives, condominiums and apartment buildings. All the buildings served by Liberty had cable systems installed prior to Liberty's offer of service. In some cases, Time Warner is using the existing master antenna television system ("MATV") owned by the building owner. In other cases, Time Warner has installed its own cables in the hallways and apartments.

* For purposes of these comments, "Cable Home Wiring" means the cable that runs from the subscriber's television set(s) to the feeder cable in the building. Feeder cables in multifamily complexes typically are installed outside individual apartments and in "common" areas such as the hallways or vertical risers concealed behind walls. In some buildings, the feeder cables are installed on the exterior of the building. Feeder cables provide signals to more than one subscriber while Cable Home Wiring provides signal only to the resident who occupies the affected apartment. Liberty agrees with footnote 4 of the NPRM that Cable Home Wiring does not include ancillary equipment such as converter boxes and A-B switches although the term does include splitters and taps affixed to the wire. See discussion infra at p. 9.

II. Changing Providers Must Be Simple and Easy for the Consumer

Liberty has found that a subscriber's enthusiasm for a competing service quickly dissipates if the subscriber perceives that he or she will encounter any difficulty in making the transition from Time Warner service to Liberty service. Simply put, the subscriber demands that the transition consist of nothing more than a single phone call and a single visit to the home to make the switch. Most subscribers would prefer to dispense with the home visit altogether. If the transition requires more involvement by the subscriber than a single phone call and a single visit, it is quickly perceived as a "hassle" and there is a real risk that the subscriber will not follow through and take Liberty's service.

It is absolutely essential to Liberty's success that it be able to use the existing Cable Home Wiring to serve its subscribers without any interference or interruption by Time Warner. It would be a serious—indeed fatal—impediment if Liberty were required to install a second wire in its subscribers' apartments.

The problem with a second wire is not the cost of the installation but rather the inconvenience to the customer. Liberty's subscribers will not tolerate the disruption and dislocation of having a second cable installed in their apartments. Most Liberty subscribers decorate their apartments and incorporate the existing Cable Home Wiring into the decor. They absolutely

will not switch to a competing service if it requires the installation of a second wire.

III. Use of Cable Home Wiring Must Be The Consumer's Decision

Head to head competition between franchised cable and alternative technologies can become a reality only if the resident controls the use and disposition of Cable Home Wiring. Once a franchised cable operator exercises control over Cable Home Wiring, other competitors will be locked out of the market because most consumers do not want the aggravation of a second set of cables installed in the home and a parade of cable technicians coming and going to install a second wire, disconnect service from the first wire and connect service to the second wire.

It has been Liberty's experience—without exceptions—that no one wants existing Cable Home Wiring removed from their home. It is Liberty's policy that when a subscriber terminates Liberty service, the customer determines the disposition of the Cable Home Wiring installed by Liberty, including the use of that Cable Home Wiring by Time Warner if the customer so directs.

Liberty proposes that any rule regarding Cable Home Wiring have an overriding and simple principle—the resident has absolute control over how the Cable Home Wiring is used including which vendor of video services will use the Cable Home Wiring. To enforce this principle, cable operators should be subject to penalties or sanctions if they fail to promptly honor the resident's wishes regarding the use, disposition or termination of Cable Home Wiring. The cable operator should also be subject to

penalty or sanctions* if it engages in any conduct or practice which, in its purpose or effect, interferes with the use of Cable Home Wiring by any multichannel video programming distributor or other video source designated by the resident.

IV. Cable Home Wiring Is A Fixture

The Commission can achieve the objective of consumer control over Cable Home Wiring by simply declaring that any Cable Home Wiring installed by any cable operator becomes, at the time of installation, a fixture of the premises in which it is installed. This is entirely consistent with the intent of both the cable operator and the resident. See, Metropolitan Cablevision, Inc. v. Cox Cable Cleveland Area, 1992 Oh.App. LEXIS 356 (Ohio Ct. App. 1992), copy annexed as Exhibit B. Declaring Cable Home Wiring to be a fixture will allow the resident to control the use and disposition of Cable Home Wiring once the resident terminates cable television service.

During the course of paying for cable television service, including installation fees, subscribers typically give the cable operator ample remuneration for the cost of installing Cable Home Wiring. Indeed, apartments change hands many times and each new resident typically pays an "installation fee" for cable that has already been installed. Accordingly, the cable operator should be deemed to have been compensated for installing Cable Home Wiring

* These penalties and sanctions should be the subject of a further notice of proposed rulemaking.

upon payment of the cable operator's prevailing fees for installation and service.

This principle will allow the Commission to recognize that all Cable Home Wiring, both existing and prospective, has been or will be purchased. The Commission should leave it to local taxing authorities and courts to determine the property tax implications of a "fixture" rule. To prevent price gouging, the Commission should order that installation fees not exceed actual costs plus a reasonable mark-up, not to exceed 25%, to cover overhead and profit.

A "fixture" rule avoids difficult proof problems on who owns Cable Home Wiring installed many years ago. It has been Liberty's experience that Cable Home Wiring in New York City is commonly part of the existing MATV in a building and belongs to the building owner. Time Warner is prohibited under its franchise from using MATV wiring in a manner that interferes with competing services such as SMATV. However, there have been disputes over who actually installed and/or paid for Cable Home Wiring and thus whether it is part of the MATV.

It has been impossible to resolve these disputes based on documentary evidence. Neither the resident, the building owner nor Time Warner have kept intelligible records of Cable Home Wiring installations—many of which occurred up to twenty years ago. A "fixture" rule eliminates reliance on inadequate records when a control or ownership dispute arises.

**V. Service Termination Must Not
Result in Frustration or Delay
of Competing Service**

The termination of service by a cable operator should be done in a manner that does not interfere with the use of Cable Home Wiring by a competitor. Liberty makes this proposal based on its own experience in New York City with Time Warner using the termination of its service as an opportunity to frustrate and delay the introduction of Liberty's service.

The termination of cable service from Cable Home Wiring typically requires the termination of lines and removal of converter boxes. It has been Liberty's experience that Time Warner insists on removing its own converter boxes and terminating its own lines. It has also been Liberty's experience that Time Warner can be very uncooperative in doing its disconnections in coordination with a Liberty installation. The consumer ultimately suffers with repeated visits to the home and an interruption in service.

To minimize this disruption, the Commission should order that any owner of Cable Home Wiring can appoint an agent, including a competing multichannel video programming distributor, to arrange for and, if necessary, implement the termination of existing cable television service from the Cable Home Wiring, including the removal of converter or other equipment and terminating feeder cables. The appointment should be in writing and the agent should assume responsibility for all damage to third party equipment and for signal leakage.

Liberty has been receiving and acting upon such agency appointments in New York City for several months. Liberty

routinely disconnects and properly terminates Time Warner feeder lines and returns Time Warner converters. There has never been a single instance of signal leakage, damage to Time Warner equipment or loss of a converter. Needless to say, Liberty's customers greatly appreciate the convenience of Liberty disconnecting Time Warner's service and installing Liberty's service in one visit.

**VI. Signal Leakage, Splitters,
Terminators and Barrel Through
Connectors**

The rules on signal leakage should of course be followed by any cable operator or multichannel video programming distributor in the use of Cable Home Wiring. Upon termination of service, the cable operator or other vendor should terminate its use of the Cable Home Wiring in a manner that prevents signal leakage from the feeder cable and, if at all possible, at a point outside of the home.

The Commission's rules should make clear that the installation of locking terminators and other equipment to prevent signal leakage, must be done in a manner that does not interfere with the use of Cable Home Wiring by a competitor. Feeder cables are typically connected to Cable Home Wiring by a "splitter" that has at least three (3) ports—two (2) connected to the feeder cable and the third connected to the Cable Home Wiring. When Time Warner disconnects a subscriber, it typically disconnects the Cable Home Wiring from the splitter, leaving the splitter in place on the feeder cable. Time Warner then installs a "locking terminator" on the splitter port that was connected to the Cable Home Wiring. The

locking terminator is typically a cylinder about 3/4" in diameter and 2" long.

Feeder cables and Cable Home Wiring are generally connected together in fairly small spaces, e.g. inside small electric boxes known as "gem" boxes in the wall or inside plastic hallway molding in the hallway. Liberty generally places its feeder cables in the same conduits and molding as Time Warner and meets the Cable Home Wiring in the same tight places, e.g. in gem boxes or hallway molding. If Time Warner keeps the splitters and locking terminators in place, Liberty may not be able to serve the subscriber because there is no room in the gem box or hallway molding for two (2) splitters and a locking terminator.

To remedy this problem, the Commission should declare that any taps or splitters affixed to Cable Home Wiring are part of the Cable Home Wiring and available for use by multichannel video program distributors or other competitors. Accordingly, when feeder cables are disconnected from the Cable Home Wiring, the splitter should remain on the Cable Home Wiring. The feeder cables should be terminated by installing a "barrel through connector"—a piece of cable that by-passes the splitter. This allows the competitor to use the splitters in place to connect their feeder cable to the Cable Home Wiring. This is the procedure that Liberty has used in New York City, generally with Time Warner's cooperation. It works smoothly so long as everyone understands what needs to be done.

**VII. Competitor's Access To Conduits
and Moldings For Feeder Cables**

The Commission has asked for comments on whether the rules for Cable Home Wiring should also extend to feeder cables. Obviously, the competitive use of Cable Home Wiring can be readily frustrated by a franchised cable operator placing feeder cables in such a way that only the franchised cable operator has access to the Cable Home Wiring. Time Warner also controls access in some New York City buildings by using and refusing to relinquish control of the building's MATV wiring, even though the MATV is owned by the building.

The Commission should adopt rules modeled on provisions in the New York City franchise to address these problems. The New York City franchise provides in Appendix B, Section I(B)(2):

Installation of all cables, wires, other component parts of the [Time Warner's] system in any structure shall be undertaken in a manner which does not interfere with the operation of any existing MATV, SMATV, MDS, DBS or other distribution system in said structure, including any conduit used in connection with such other system.

Section 3.3 of the New York City franchise provides:

In the operation of the System, [Time Warner] shall not interfere in any way with, nor utilize, any master antenna systems, satellite master antenna system or any other similar system within any building.

These provisions should be incorporated in the Cable Home wiring rules and apply to both existing and prospective MATV, SMATV, MMDS, DBS and other competing systems. See Exhibit A at ¶¶ 8 and 9. Liberty has successfully invoked these franchise

provisions to obtain joint access with Time Warner to necessary conduits and moldings for the placement of Liberty's feeder cables and, if necessary, to take control of a building's MATV.

**VIII. There Is No Need To Tailor
Rules For Different Settings**

The Commission has asked for comment on whether the Cable Home Wiring should be tailored to different settings, e.g. single family homes, single buildings or multiple buildings. The principles proposed by Liberty can be readily applied to each of these circumstances. Liberty does not see any reason or need to differentiate between the various kinds of settings in the application of Cable Home Wiring principles.

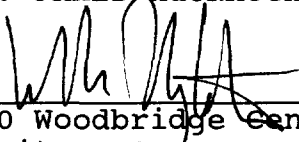
Nor should the manner in which franchised cable operators obtain access to a building vary the application of the proposed principles to Cable Home Wiring within a building. However, the Commission should consider the impact of state mandatory cable access laws on the ability of multichannel video programming distributors to get access to Cable Home Wiring. In New York City, Time Warner generally obtains non-exclusive access to multifamily complexes pursuant to Executive Law § 828. Thus Liberty has not confronted the direct legal impediment of an exclusive contract that precludes its entry to the building.* However, Liberty is nonetheless unable to obtain negotiated access to some buildings

* The Commission should nonetheless consider conducting an inquiry into and rulemaking on the use of exclusive contracts by franchised cable operators to lock out alternative technology competitors from buildings. See Satellite Television and Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351 (4th Cir. 1983), cert. denied 465 U.S. 1026 (1984).

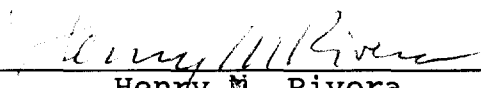
because Time Warner has wired the building pursuant to Executive Law § 828 and the owner does not want the disruption of a "second" cable service on the property.

The Commission has previously determined that state mandatory cable access laws such as Executive Law § 828 frustrate the growth of alternative technologies. See In the Matter of Competition, Rate, Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 R.R.2d 1771 (1990) at ¶¶ 137-140. Liberty's experience confirms the Commission's findings. The Commission should preempt such discriminatory laws because they hinder the growth and development of SMATV and other alternative technologies. See In Re: Earth Satellite Communications, 95 F.C.C.2d 1223 (1983), aff'd sub nom. New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

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EXHIBIT A

EXHIBIT A

Principles To Be Incorporated In the Commission's Rules for Cable Home Wiring

1. "Cable Home Wiring" is cable or wire used to provide video service from the resident's television set(s) to feeder cables and includes any splitters or taps affixed to the Cable Home Wiring but not converters or amplifiers. Cable Home Wiring does not include feeder cables or wires. Feeder cables or wires provide signal to more than one subscriber.
2. The resident in the premises in which the Cable Home Wiring is installed shall, at all times, absolutely control which vendor of video services, if any, will use the Cable Home Wiring and the timing and manner of that use.
3. Any cable operator who fails to promptly honor the resident's wishes regarding the use, disposition or termination of Cable Home Wiring will be subject to sanctions and penalties.
4. Any cable operator who engages in any conduct or practice which, in its purpose or affect, interferes with the use of Cable Home Wiring by a multichannel video programming distributor or other source designated by the resident shall be subject to sanctions and penalties.
5. Upon installation of any Cable Home Wiring by any cable operator, the Cable Home Wiring becomes a fixture of the premises in which it is installed. This principle applies to all existing and future installations of Cable Home Wiring. The cable operator shall be deemed compensated for the cost of installing Cable Home Wiring upon payment by the subscriber of the cable operator's prevailing fees for installation and service. The cable operator's installation fees for Cable Home Wiring shall not exceed actual cost plus a reasonable mark up, not to exceed twenty-five percent (25%), to cover overhead and profit.
6. The resident may appoint an agent, including any competing multichannel video programming distributor, to arrange for and, if necessary, implement the termination of existing cable service from Cable Home Wiring, including, without limitation, the removal and return of converters and termination of feeder lines. The appointment will be in writing and the agent will assume responsibility for all damages and signal leakage associated with its work.

7. Feeder cables will be terminated in a manner that does not interfere with the use of Cable Home Wiring by others including, if necessary, the use of barrel through connectors on feeder cables.
8. Any cable system, including feeder cables, will be installed in a manner which does not interfere with the existing or future use of Cable Home Wiring by any MATV, SMATV, MMDS, DBS or any other distribution system. The cable system shall specifically allow sufficient space in any conduit or molding it uses within a building to allow such other system(s) access to Cable Home Wiring.
9. In the operation of a cable system, the cable operator shall not interfere in any way with, nor utilize, any MATV, SMATV, MMDS, DBS or any other distribution system within a building.
10. The cable operator shall be responsible for signal leakage from any cables or wires it uses.

EXHIBIT B

1ST CASE of Level 1 printed in FULL format.

METROPOLITAN CABLEVISION, INC. PLAINTIFF-APPELLEE v. COX
CABLE CLEVELAND AREA DEFENDANT-APPELLANT

Metropolitan Cablevision, Inc. v. Cox Cable Cleveland
Area

NO. 59883

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY

1992 Ohio App. LEXIS 356

January 30, 1992, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE
PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court,
No. 172910.

DISPOSITION: JUDGMENT: AFFIRMED.

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JUDGES: MATIA, SPELLACY, HARPER

OPINIONBY: DAVID T. MATIA

OPINION: JOURNAL ENTRY AND OPINION

MATIA, C.J.:

This appeal arises out of the judgment of the Cuyahoga County Court of Common
Pleas which found that the cable wiring installed in a subscriber's home by a
cable television company was a fixture. Appellant finds error, and assigns this
issue for our review. We affirm the decision of the trial court.

STATEMENT OF THE FACTS

Defendant-appellant Cox Cable Television Company is a cable television
company with a cable franchise in the City of Parma, Ohio, as well as other
communities in Cuyahoga County.

Plaintiff-appellee Metropolitan Cablevision, Inc. d.b.a. MetroTen
Cablevision is a cable television company which provides "wireless" cable to
[*2] the City of Cleveland, the Northeast Ohio area, including Parma, through
a technology known as Multichannel Multipoint Distribution System ("MMDS").

Unlike other cable companies, MetroTen transmits signals through the air to an antenna located on the subscriber's home. MetroTen and Cox compete for cable customers in the City of Parma.

When Cox installs service in a new subscriber's home, it runs a wire from the cable pole to the house through a drilled hole in the house to the television set. If the television is not near the wall, Cox uses such clips to attach the wiring to the baseboard. A grounding device is also used and attached to the rafters in the basement with screws. Cox runs wiring along the interior walls if necessary. When a subscriber cancels his service, Cox is under no obligation to remove the wiring unless the homeowner requests its removal in writing. (Parma Ordinance, Section 717.22.)

If a former Cox Cable subscriber switches to MetroTen, MetroTen will use internal wiring previously installed by Cox Cable to provide MetroTen's service to that subscriber. MetroTen installs its antenna and runs wiring from its antenna to the ground-block left by Cox Cable. MetroTen [*3] then uses the wiring left by Cox Cable from the ground-block to the subscriber's television set.

Plaintiff-appellee Dawn Mueller is a homeowner in Parma. After cancelling her Cox Cable subscription, she refused to permit Cox Cable's removal of her internal wiring. Both Mueller and MetroTen allege that the internal wiring left in the homes of former subscribers by Cox Cable are fixtures. Cox alleges that the contract between Cox and the homeowner expressly asserts that internal wiring remains the property of Cox Cable and never becomes a fixture.

STATEMENT OF THE CASE

Appellee MetroTen filed for a declaratory judgment and injunctive relief against Cox and the City of Parma after it learned that the City of Parma by and through its Law Director had found that the internal wiring left by Cox Cable in the homes of former subscribers was not a fixture and there for MetroTen had no right to use that wiring unless Cox gave express permission.

In its complaint for declaratory judgment, MetroTen prayed that the court find that the internal wiring was either a fixture or that Cox had abandoned the wiring. Cox counterclaimed for reasonable value of the use of its equipment. Before the hearing, [*4] MetroTen voluntarily dismissed the City of Parma from the case.

After the initial hearing the trial court made findings of fact and conclusions of law. The trial court held both that the internal wiring was a fixture and that unless Cox Cable removed the internal wiring within a reasonable time after a subscriber cancelled his service, Cox abandoned that wiring. No decision was made on Cox's counterclaim.

Based upon the holding that Cox abandons the internal wiring unless removed within a reasonable time after the subscriber cancels, Cox began removing the internal wiring in the homes of subscribers who cancelled. The trial court, realizing its earlier decision needed clarification, set the matter for another hearing. MetroTen filed an amended complaint and that amended complaint included a new party, appellee Dawn Mueller, who asked the court to enjoin Cox from removing the wiring in her home after she cancelled her Cox Cable Service.

As a result of the second hearing, the trial court found that the internal wiring was a fixture and enjoined Cox Cable from prosecuting either civil or criminal actions against MetroTen for its use of the internal wiring and from prosecuting Dawn Mueller [*5] based on her refusal to allow Cox to remove the internal wiring from her home. The court did not find that Cox abandoned the wiring. The court also dismissed Cox's counterclaim.

The trial court journalized its judgment entry on May 4, 1990. On May 25, 1990 Cox Cable filed a timely notice of appeal from that judgment.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FINDING THAT INTERNAL WIRING INSTALLED IN A HOME BY A CABLE COMPANY IS A FIXTURE WHICH BECOMES THE PROPERTY OF THE HOMEOWNER."

Appellant argues in his sole assignment of error that the trial court erred in finding that internal wiring installed in a home by a cable company is a fixture. Specifically, appellant argues that internal wiring remains the property of the cable company.

This assignment of error is not well taken.

ISSUE: WHETHER CABLE WIRING INSTALLED IN A SUBSCRIBER'S HOME BECOMES A FIXTURE

In determining whether articles annexed to the leasehold by the tenant have become fixtures, the trier of fact must consider: the nature of the property; the manner of annexation; the purpose of annexation; the intention of the annexing party; the difficulty of removal; and the damage to the severed property [*6] which removal would cause. *Brown v. DuBois* (1988), 40 Ohio Misc. 2d 18, 532 N.E. 2d 223.

In the cause sub judice, the court is not making a determination regarding fixtures placed in a leasehold by the tenant, however, the holding in *Brown* reaffirms the general rule of law in Ohio since 1853 that a fixture to realty brings into issue not ownership, but rather, whether the fixture becomes a permanent part of the realty and thus capable of passing with the freehold or leasehold estate.

"It is an ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quicquid plantatur, solo, solo cedit*, is the language of antiquity in which the maxim has been expressed. The term fixture, in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate but necessary to distinguish this class of property from moveable property, possessing [*7] the nature and incidents of chattels. It is in this sense, that the term is used, in far the greater part of the adjudicated cases * * *. [Citations omitted.] It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject." *Teaff v. Hewitt* (1853), 1 Ohio St. 511, at 524-525.

This general rule has been reviewed, examined, reaffirmed and refined by the Ohio Supreme Court.

"We reaffirm that such a determination must be made in light of the particular facts of each case, taking into account such facts as the nature of the property; the manner in which it is annexed to the realty; the purpose for which annexation is made; the intention of the annexing party to make the property a part of the realty and dedicate it irrevocably to the realty for a particular use; the degree of difficulty and the extent of any economic loss involved in thereafter removing it from the realty; and the damage to the [*8] severed property which removal would cause." *Masheter v. Boehm* (1974), 37 Ohio St. 2d 68, 77, 66 O.O. 2d 183, 188,, 307 N.E. 2d 533, 540.

The *Masheter* court indicated a desire to define a "proper rule of law, which provides that degree of flexibility and accommodation to circumstances necessary to ensure that * * * [the parties] will be dealt with fairly, with neither enjoying a windfall gain nor suffering unfair deprivation." *Masheter*, supra, at 76-77, 66 Ohio Ops. 2d at 188, 307, N.E. 2d at 540. See, for example, *Zangerle v. Republic Steel Corp.* 144 Ohio St. 529, 30 Ohio Ops. 160, 60 N.E. 2d 170; *Roseville Pottery, Inc. v. County Bd; of Revision*, 149 Ohio St. 89, 36 Ohio Ops. 440, 77 N.E. 2d 608; *Gregory v. Helman* (App.) 14 Ohio Law. Abs. 193; *Novak v. Jicha* (Common Pleas), 3 Ohio Ops. 134, 19 Ohio Law Abs. 105; *Zangerle v. Evatt* (BTA), 22 Ohio Ops. 344, app. dismd. 139 Ohio St. 563, 23 Ohio Ops. 52, 51 N.E. 2d 369. [*9]

In reviewing the cause herein, and applying the standards enunciated by precedent, this court finds that the trial court properly found that the cable wiring placed in the subscriber's home by Cox Cable Company was a fixture, thus part of the realty by annexation.

The wiring supplied by the appellant Cox Cable is stapled screwed and clamped to the walls, floorboards, basement rafters, exterior and interior walls of the subscriber's home. The facts indicate that appellant Cox Cable is efficient and minimally intrusive into the integrity of the structure as possible, however, holes are drilled into the exterior wall of the subscriber's home to permit egress of the cable service into the subscriber's television service. Wires are annexed to the floorboards of the home if necessary. A ground wire is attached, preferably, to the cold water line in the basement. Most importantly, notwithstanding appellant's contract with the subscriber, prior to MetroTen's complaint, the cable wiring was customarily left in the home after the subscriber terminated appellant's cable service.

Appellant Cox Cable's own testimony revealed that the wire was intentionally left in the subscriber's home due to [*10] the high incident of repeat service either by resubscription or a new subscription by new tenants or home owners. Appellant Cox Cable further testified that removing the cable was more costly than it was worth, and that although the wiring could be removed without causing a great amount of damage, some damage could result from removal of the cable wires.

We find conclusively then that the facts of the cable wiring fit squarely within the rules determining whether the moveable property becomes so attached to the realty as to become a fixture and therefore a part of the estate. *Teaff*, supra; *Masheter*, supra; *Brown*, supra. Accordingly, we find that the trial court properly determined that the cable wiring is a fixture.